

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

THE PEOPLE OF THE  
STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No.: 153697  
Court of Appeals No. 324963  
Lower Court Case No. 14-19392-FC

V

JOSE L. GARCIA-MANDUJANO,

Defendant-Appellant.

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Michael J. Bedford (P48853)  
Van Buren Prosecuting Attorney  
Eric Jenkins (P77863)  
Assistant Prosecuting Attorney  
Attorneys for Plaintiff-Appellee  
212 Paw Paw Street  
Paw Paw, MI 49079  
Phone: (269) 657-8236

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John T. Burhans (P32176)  
BURHANS LAW OFFICE, P.C.  
Attorney for Defendant/Appellant  
109 Hawthorne Avenue  
P.O. Box 648  
St. Joseph, MI 49085  
Phone: (269) 982-8505  
Fax: (269) 982-1928  
e-Mail: [jtburhan@aol.com](mailto:jtburhan@aol.com)

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**DEFENDANT-APPELLANT'S REPLY BRIEF**

DATED: January 24, 2017

John T. Burhans (P32176)  
Attorney for Defendant-Appellant  
Burhans Law Office, P.C.  
P.O. Box 648  
St. Joseph, MI 49085  
(269) 982-8505

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**STATEMENT OF QUESTIONS**

WAS DEFENDANT DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL ATTORNEY FAILED TO IMPEACH THE TESTIMONY OF THE PHYSICIAN'S ASSISTANT, THAT SHE USED AN ADULT SPECULUM ON THE COMPLAINANT, WITH THE WITNESS REPORT?

Defendant-Appellant Answers the Question "YES"  
The People Answer the Question "NO"  
The Court of Appeals Answered the Question "NO"

WAS DEFENDANT PREJUDICED BY HIS TRIAL COUNSEL'S FAILURE TO USE THE PHYSICIAN'S ASSISTANT'S REPORT WHEN CROSS EXAMINING THE WITNESS?

Defendant-Appellant Answers the Question "YES"  
The People Answer the Question "NO"  
The Court of Appeals Answered the Question "NO"

## STATEMENT OF FACTS

Exhibit R from the *Ginther* Hearing is the medical records that trial counsel subpoenaed a week before trial. They are the progress notes of the Complaint's treating physician's assistant, Jean Lafever. *Ginther Hearing* at 108-109.

Trial counsel testified at the hearing there was no mention in Exhibit R of any kind of examination by the physician's assistant with a speculum. *Id* at 112. It is undisputed that counsel did not interview the physician's assistant about anything or probe beyond the four corners of defense Exhibit R. *Id* at 112-113. He testified at the *Ginther* Hearing that the records were intended to establish no physical injury to the complainant. *Id* at 114.

The prosecution produced the physician's assistant on direct examination; nothing came out about an adult speculum. Lafever testified, however, about the speculum on cross examination, which came as a surprise to defense counsel. In an effort to establish that there was no physical evidence regarding sexual assault in her report, the following exchange occurred at the jury trial:

Q. Okay. And other than Abigail's claims, there was no medical evidence that you discovered. Correct?

A. It was very easy to examine her. *I used an adult woman's speculum on her and it entered very easily. She had no problem receiving that. That was highly unusual for a 12-year-old.* T I 220. (emphasis added).

Without impeaching the physician's assistant with her progress notes regarding the absence of any mention of a speculum, defense counsel nevertheless returned to the unexpected testimony about the speculum a second time as follows:

Q. Do you put a speculum in people?

A. No.

Q. So you had never done that before?

A. No.

Q. So it's possible it was -- always would have been that way regardless of what she said; you wouldn't know?

A. It is not typical for a child that age to be able to tolerate even a small pediatric speculum, let alone an adult speculum. T I 221

Trial counsel again did not impeach the physician's assistant regarding the absence of any mention of the speculum in her report. The only testimony from Lafever about the speculum was elicited by trial counsel during his cross examination.

During his closing argument, the prosecutor exploited the surprise and unimpeached testimony about the speculum on three separate occasions. First, the prosecutor characterized the questioning of trial counsel of the physician assistant as follows:

*Now, the defense attorney makes a huge mistake.* He could have interviewed the physician's assistant. We had a report all along. He knew who she was. He could have called her up and said, "Hey, I'm going to ask you on the stand, 'Was there anything in your physical examination or your findings that would be indicative of this type of assault?'" But he didn't, and he helped you get more truth. And now he's going to call her a liar? Don't think so. T II 123-124 (emphasis added).

The prosecutor further exploited the mistake of trial counsel to support the credibility of the complainant:

When you compare what she said about the ease of the insertion of the adult-sized speculum into Abigail's vagina and how *abnormal* that was and how she paused when he had asked that question, and then he went back to it, she paused again. "*Abnormal*" is the word that I remember her saying. I leave that to you.

What does that tell you? Well, it tells you that it's *consistent* with other things having been put in her vagina before. Could be tampons; could be fingers, *the defendant's fingers; could be a penis, the defendant's penis.* TII 124 (emphasis added).

The prosecutor's third foray was also successfully exploited to corroborate the testimony of the complainant's allegations of rape that

"he stuck his fingers in there and it hurt, she didn't like it. *Sooner or later you keep sticking things in there long enough*, it is very consistent with what Dr. Lafever told us." TII 125 (emphasis added).

At the Ginther Hearing, trial counsel testified that he anticipated that the physician's assistant would speak only to what was in her report and the speculum was not there. *Ginther*

*Hearing* at 117. On her cross examination, he sought to establish that there was no medical evidence pertaining to the complainant. *Id* at 117. He testified that he could have cross examined the physician's assistant on inconsistencies between the date of the alleged acts without getting into other areas where the speculum came up. *Id* at 118-119.

Trial counsel described his failure to impeach the physician's assistant:

Q. Was the adult speculum the only physical evidence that went against Jose Garcia?

A. Yes. I think the girl may have testified to droplets or something in the bathroom. I don't know if you call that physical evidence.

Q. There was no evidence admitted of any blood. Correct?

A. Other than her statements.

Q. Statements. Okay. No physical evidence introduced as an exhibit. Correct?

A. Correct, and there was no other medical evidence.

Q. Medical evidence. Maybe that's a better way to put it. No STD evidence?

A. Correct.

Q. No tears. Correct?

A. Correct.

Q. No DNA?

A. Correct.

Q. And in your cross-examination, because it was a surprise, was it also the case that you didn't question the physician's assistant as to why the speculum was not in her report, in Exhibit R?

A. I thought I did ask her that, but maybe not.

Q. The record would speak for itself?

A. The record would speak for itself.

Q. Do you agree that would be a good idea to cross-examine her on the speculum that she's testifying to now not being in her report?

A. Yeah, I thought I made mention of it, but on recross or something, but yes.

Q. It would have been a good idea?

A. It would have been a good idea.

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A. Maybe I was so scared about mentioning her report that I didn't bring it up for that reason.

Q. Okay. All right.

A. I'm sorry.

Q. Fair enough. *Ginther Hearing* at 125-126

The record establishes that no challenge by trial counsel was made of why the speculum was not in Exhibit R. T I 218-222, 224-225. Trial counsel made the following reference in his closing

argument:

The PA in her belated claim admitted that there is really -- it doesn't really mean anything, it doesn't really tell us anything, and I guarantee you, if that was in her report, Mr. Bedford would have brought that out in his opening and he would have entered that report. It was clearly a belated claim by a very biased and supportive physician's assistant. She wanted to support Abigail. T II 112.

Reference to the “belated claim” was not related to cross examination about the medical report.

Trial counsel testified about the impact of the adult speculum testimony in the context of the credibility of the complainant:

Q. Okay. In terms of this credibility contest, going back to that, between Jose and Abigail, do you think that the adult speculum testimony might have tipped the balance against Jose?

A. It was not good for us. *Id* at 128-129.

Trial counsel agreed that the credibility contest between Defendant and the complainant was hurt because of the surprise testimony from the physician's assistant concerning the speculum. *Ginther Hearing* at 132. He agreed that obviously, “if you have witnesses that you didn't bring, you don't know what they are going to say. . . .” *Id* at 154. This applied to the physician's assistant in that he agreed that if he had interviewed her he could have found out what she would have said in her testimony at the jury trial. *Id*.

## ARGUMENT

### **I. DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL ATTORNEY FAILED TO IMPEACH THE TESTIMONY OF THE PHYSICIAN'S ASSISTANT, THAT SHE USED AN ADULT SPECULUM ON THE COMPLAINANT, WITH THE WITNESS'S REPORT**

A defendant claiming ineffective assistance of trial counsel must meet two requirements. First, he must show that his counsel's performance fell below an effective standard of reasonableness. To establish this, defendant must overcome the “strong presumption that counsel's assistance constituted sound trial strategy.” Second, the defendant must show that in the absence of the deficient performance, “a different result would have been reasonably



probable.” *People v. Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). In the context of the present case, these issues have been framed by this Court as follows:

(1) whether the defendant was denied effective assistance of counsel where his trial attorney failed to impeach the testimony of the physician’s assistant, that she used an adult speculum on the complainant, with the witness’s report, which contained no reference to the speculum; and (2) whether the defendant was prejudiced by trial counsel’s failure to use the physician assistant’s report when cross-examining the witness.

Defendant contends that the answer to both issues is “yes.”

Concerning the threshold concern, defense counsel’s performance fell below an objective standard of reasonableness. After failing to interview the physician’s assistant about her proposed testimony, and especially the matters contained within her medical records, defense counsel was surprised by her unexpected testimony concerning the examination of her patient with an adult speculum. Because trial counsel was fully aware that there was no mention of a speculum in the medical report, his cross examination should have included impeachment of the physician’s assistant of her testimony on this issue. Also, due to the inflammatory nature of the testimony regarding how “easily” it fit inside the complainant and how it was so “highly unusual” that it could be done, the failure of trial counsel to impeach her by noting that it was absent from the medical records was a glaring error.

To the argument that defense counsel was, perhaps, taken aback by the surprise testimony, is the fact that he engaged her on re-cross examination. On re-cross, defense counsel again invited testimony about the speculum, but failed to confront the witness about how such a significant, revealing and damaging fact could be absent from her medical report.

Failure to impeach the witness on the omission of any mention of the speculum in her medical records was not a sound trial strategy. It was an error by omission that trial counsel should have corrected on cross examination and when he raised it on recross examination when he revisited the issue. In the eyes of the jury, which had no idea about the absence of the

speculum evidence in the medical records, the physician's assistant's testimony on the speculum was a highly damning fact that occurred naturally during the course of her examination of the complainant on December 10, 2013. The only effective way to blunt the highly incriminating nature of the evidence was to challenge the witness with her report and read the significant excerpts from the records. Jean Lafever's physical exam report states in part as follows:

Genitourinary: There is no rash or lesion on the right labia. There is no rash or lesion on the left labia. No tenderness around the vagina. No vaginal discharge found.  
Vaginal Cultures were obtained. Exhibit R at 2.

By impeaching the witness with the above statements, defense counsel could have questioned the absence of the speculum evidence, especially given the detailed nature of the report with regard to the other examinations. Failing to do this left the jury with the impression that an examination with an adult speculum actually occurred. The failure also prevented defense counsel from arguing that such a detailed and sensational examination with a speculum could be absent from the report. That alone could have created reasonable doubt about the testimony of the witness.

In *Armstrong*, defense counsel failed to pursue the introduction of cell phone records which would have established continuing friendly contacts between the complainant and the defendant after the commission of a sexual assault. The Court stated that failure to seek admission of the records did not constitute sound trial strategy. Admission of the records "would have caught the complainant in a lie." This would have aided in attacking the complainant's credibility, which was the most promising defense strategy. 490 Mich at 290-291.

The People contend that failing to impeach the physician's assistant was just "one missed opportunity in the course of a trial" and cannot "rise to the level of making the proceedings end in a different outcome . . . ." Brief at 14. However, in *Armstrong*, the trial court's conclusion – that "one more attack on the complainant's credibility" regarding impeachment with cell phone records would not have resulted in an acquittal – was not accepted by the Court. 490 at 288-289.

In *People v. Trakhtenberg*, 493 Mich 38; 826 NW2d 136 (2012), Defendant was convicted of three counts of second degree criminal sexual conduct. Complainant testified that defendant touched her genitals three or four times and he would lower her hand to his genitals. Complainant's mother denied the defendant's argument that he was treating complainant's yeast infections with ointment and that complainant became upset when she had to go to defendant's home. Defense counsel was ineffective "for failing to impeach Tetarly [the mother] with evidence of bias pertaining to her divorce four years earlier" in which the mother had attempted to hit defendant with her car and assaulted defendant while he was driving. *Id* at 43-44.

While recognizing the strong presumption that counsel's "performance was born from a sound trial strategy, . . . yet a court cannot insulate the review of counsel's performance by calling it trial strategy." *Id* at 52. Rather, a court must determine whether the "strategic choices [were] made after a less than complete investigation" and any choice is "reasonable precisely to the extent that reasonable professional judgment support the limitations on investigation." Because the case turned solely on credibility, the issue is whether the complainant's allegations of sexual abuse were truthful. "Counsel's failure to cross examination Tetarly and adequately impeach the complainant was the result of counsel's unreasonable decision to forego any investigation in the case." *Id* at 54-55. The Court held that counsel's performance was constitutionally deficient "because a sound defensive strategy cannot follow an incomplete investigation of the case when the decision to forego further investigation was not supported by reasonable professional judgment." *Id* at 55.

## **II. DEFENDANT WAS PREJUDICED BY HIS TRIAL COUNSEL'S FAILURE TO USE THE PHYSICIAN'S ASSISTANT'S REPORT WHEN CROSS-EXAMINING THE WITNESS**

The People reason that defense counsel thoroughly impeached the credibility of the complainant in cross examining the physician's assistant. To the contrary, defense counsel's

attempt to establish that there was no medical evidence supporting a claim of sexual assault backfired when he (1) failed to interview Dr. Lafever to find out what took place during the examination and (2) failed to impeach her with her own report. The failure to impeach the witness compounded the earlier failure to interview the witness in a manner that severely prejudiced the outcome of the trial.

Failing to admit the report into evidence prevented defense counsel from effectively pointing out that absence to the jury during cross examination as well as closing arguments. T I 3; T II 2. Defense counsel's testimony that he wanted to leave the report alone because he was "scared" of revisiting it, would not lessen the impact of the speculum testimony. Rather, it would serve only to leave it sitting unchallenged in the mind of the jury. Not impeaching the physician's assistant deviated from trial counsel's own trial strategy, which was to challenge the credibility of complainant and complainant's witnesses. Not only did the jury hear damning evidence about an examination that probably didn't occur, defense counsel never challenged the witness for bias on that issue by challenging the speculum testimony that was missing from her medical report.

The People raise bias on the part of the physician's assistant and that defense counsel sought to illuminate that issue before the jury. However, the bigger issue is whether or not she fabricated testimony about the adult speculum during her examination of the complainant. Whether cast as bias or credibility of the physician's assistant, it was essential for defense counsel to present to the jury the fact that the speculum examination was not in her contemporaneous progress notes. As a result, defense counsel missed the opportunity to argue that the witness fabricated her testimony.

The People contend that the "decisions" of trial counsel in the present case should not be second guessed. However, there is a difference between a failure to act based upon a strategic

decision versus an abdication of responsibility. If the strategy was to show bias on the part of the physician's assistant, defense counsel failed to show that the witness omitted the speculum facts in her report. That strategy crumbled in the presence of the speculum testimony and no attempt was made to challenge it through impeachment. Because the physician's assistant was not impeached, the only physical evidence in the case was uncontradicted in the most prejudicial manner. Although the People assert that "this adult speculum was new information," that begs the question as to whether trial counsel should have discovered it in the first place by interviewing the physician's assistant, or impeaching her.

In *Armstrong*, the Court rejected the contention that complainant's credibility had been thoroughly impeached already: the "attacks on the complainant's credibility at trial were inconclusive, providing mere 'he said, she said' testimony contradicting the complainant's version of the events." *Id* at 291.

In *People v. Grissom*, 492 Mich 296, 314; 821 NW2d 50 (2012), this Court "reconsidered the significance of impeachment evidence and its use as grounds for granting a new trial." The Court recognized the importance of evidence attacking the credibility of the complainant because "the defense's whole theory of the case was that the complainant had falsely accused defendant of rape." Impeachment evidence "was found to be sufficiently important to the determination of guilt or innocence that it could change the result on retrial." In these circumstances, we held that a defendant might be entitled to a new trial." *Id*.

In *Trakhtenberg*, the Court held that defendant could show prejudice by showing that "but for counsel's deficient performance, a different result would have been reasonably probably." Defendant can meet this burden "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." 493 Mich at 56. In addition "where there is relatively little evidence to support a guilty verdict to begin with (e.g., the

uncorroborated testimony of the single witness) the magnitude of errors necessary for a finding of prejudice will be less than where there is greater evidence of guilt.” *Id.*

The Court held in *Trakhtenberg* that the reliability of the convictions was undermined by defense counsel’s “failure to introduce impeachment evidence and evidence that corroborated defendant’s testimony. The defense strategy not to present the trier of fact with vital evidence was the result of counsel’s failure to employ a reasonable professional judgment, which limited counsel’s knowledge of the existence and importance of that evidence” *Id* at 56-57. The failure of defense counsel to cross examine the mother deprived the trier of fact “of necessary and available evidence that discredited the complainant’s allegations,” and “left the record completely devoid of any motivation that Tetarly may have had to distort and encourage the complainant’s allegations.” *Id* at 57.

Where complainant’s allegations of criminal sexual conduct are either true or false, the absence of the impeachment evidence against the physician’s assistant calls into question the reliability of defendant’s convictions. If defense counsel in the present case had exercised reasonable professional judgment, he “would have discovered and presented impeachment evidence and evidence that corroborated defendant’s testimony, and there is a reasonable probability that the result of the trial would have been different.” *Id* at 58. Consequently, defendant has shown that he has met the standard for prejudice by the defense counsel’s errors.

### **CONCLUSION**

For the reasons and authorities set forth above, Defendant respectfully requests that this Court GRANT Defendant-Appellant’s Application for Leave to Appeal, vacate his conviction and remand for a new trial.

Dated: January 24, 2017

/s/John T. Burhans  
John T. Burhans (P32176)  
Attorney for Defendant-Appellant